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17 **UNITED STATES DISTRICT COURT**
EASTERN DISTRICT OF CALIFORNIA
 18 **[Sacramento Division]**

19 **KELSEY BRUST, et al.,**

20 **Plaintiff,**

21 **vs.**

22 **REGENTS OF THE UNIVERSITY OF**
CALIFORNIA, et al.,

23 **Defendants**

CASE NO. 2:07-CV-01488-FCD-EFB

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' RULE 12(b)(6) MOTION

Date: December 14, 2007
 Time: 10:00 a.m.
 Courtroom: 2

Honorable Frank C. Damrell

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1 **I. INTRODUCTION**

2 Plaintiffs Kelsey Brust, Laura Ludwig, and Jessica Bulala have brought this complaint against
 3 the Regents of the University of California (“Regents”) and two of the officials at the University of
 4 California at Davis (“UCD”) for refusing to provide equal opportunity to women in UCD’s athletic
 5 program. UCD promotes itself as a bastion for women athletes and yet, thirty-five years after Title IX
 6 was enacted, UCD continues to favor men over women in athletics, and as a result continues to deprive
 7 women students of equal opportunity in their education.

8 Defendants move to dismiss the complaint on various grounds. Plaintiffs concede that the
 9 Regents are immune from Plaintiffs’ state law claims and claim for punitive damages. The rest of
 10 Plaintiffs’ complaint, however, is properly pled, and Defendants’ motion on all other grounds must be
 11 denied.

12 First, Defendants’ argument that this Court should find as a matter of law that UCD is in
 13 compliance with Prong 1 of the Office of Civil Rights’ (“OCR”) three-pronged test for evaluating a Title
 14 IX ineffective accommodation claim is not well taken. The 6% disparity between female athletic
 15 participants and enrollment alleged in the complaint is based on UCD’s numbers alone. The actual
 16 disparity is a factual matter that must be developed, and cannot be resolved on the pleadings. Moreover,
 17 even if UCD’s 6% disparity were true, it is not substantially proportionate. The law is clear that
 18 something at or near actual proportionality is required. Defendants concede that not a single case has
 19 held that *any* differential is sufficient to satisfy Prong 1 as a matter of law. Defendants’ effort to
 20 extrapolate a permissible percentage from cases identifying what is an impermissible percentage is
 21 unavailing. Thus, Plaintiffs’ allegation that Defendants have not satisfied Prong 1 (or any other prong of
 22 the test) is sufficient to survive Defendants’ motion.

23 Second, Defendants’ argument that Plaintiffs’ Title IX claim for unequal financial assistance
 24 must be dismissed reveals a misreading of the complaint. Plaintiffs’ allegation that UCD fails to provide
 25 equal financial assistance is simply a factual allegation that supports their unequal accommodation
 26 claim. Plaintiffs do not plead a separate claim for relief for unequal financial assistance, so there is
 27 nothing subject to dismissal.

28 Third, Plaintiffs have properly pled that the Regents and the individual defendants, UCD

1 Chancellor Larry Vanderhoef and UCD Athletic Director Greg Warzecka, have violated the Equal
 2 Protection Clause by discriminating against them and other women students at UCD. This equal
 3 protection claim is distinct from Plaintiffs' Title IX claim against the Regents. Defendants have failed
 4 to meet their heavy burden of demonstrating that Congress intended Title IX to preclude Plaintiffs'
 5 pursuit of their constitutional claims, which lies against different Defendants for violation of different
 6 rights and provides different remedies. Plaintiffs' equal protection claim is not subsumed by Title IX.

7 Fourth, Defendants have failed to demonstrate that Defendants Vanderhoef and Warzecka are
 8 immune from any of Plaintiffs' claims. They are not entitled to qualified immunity because Plaintiffs
 9 properly allege that Defendants' discrimination against them unreasonably violates their fundamental
 10 and constitutional right to equal protection of the law. They are not entitled to discretionary immunity
 11 because, as Plaintiffs allege in the complaint, Defendants were acting in furtherance of UCD's policy of
 12 refusing to provide equal athletic opportunities to women.

13 Accordingly, the Court should deny Defendants' Motion to Dismiss.

14 **II. FACTUAL SUMMARY**

15 UCD has an ongoing practice of providing its male students with greater athletic opportunities
 16 than its female students, despite the significant interest and ability of its female students. While UCD
 17 touts itself as a leader in athletics for women, it has continually failed to provide women with equal
 18 opportunity to participate in varsity athletics, it has a history of failing to expand the athletic
 19 opportunities available for women, and it disregards the interest and ability in athletics of its current
 20 female students. (Compl. ¶¶ 22-25.)

21 The percentage of women enrolled at UCD continues to increase, yet, UCD has not
 22 proportionally expanded the opportunities available to women in athletics. (Compl. ¶ 24.) In fact,
 23 although several women's sports club teams, including field hockey and rugby, have demonstrated their
 24 interest in obtaining varsity status, UCD has denied the varsity applications of at least five registered
 25 sports clubs. (*Id.* ¶ 25.) In contrast to their assertions that they have expanded opportunities, UCD has
 26 actually decreased the athletic opportunities for women by eliminating sports, such as field hockey and
 27 wrestling. (*Id.* ¶¶ 24-25.) Additionally, UCD uses different criteria in its treatment of its men's teams,
 28 for example, it relies to a greater extent, in the case of men, on recruiting athletes from various sources

1 to determine which teams to establish and maintain. (*Id.* ¶ 23.)

2 Plaintiffs Brust and Bulala are active participants in and highly skilled members of UCD' club
 3 field hockey team. (Compl. ¶¶ 11(a) & (b).) Both have been involved with field hockey since
 4 childhood and have a strong interest in varsity opportunities. (*Id.*) Plaintiff Ludwig wrestled throughout
 5 high school and has played rugby at UCD. (*Id.* ¶ 11(c).) She wanted to wrestle at UCD, but was unable
 6 to do so because UCD eliminated women's varsity wrestling. (*Id.*) She has played on the UCD rugby
 7 club team and has an interesting in participating in varsity sports at UCD. (*Id.*)

8 As a result of Defendants' failure to provide equal opportunities for women athletes, or to
 9 continuously expand the opportunities it provides for women, Plaintiffs have been denied the chance to
 10 play varsity sports. Plaintiffs also have been denied varsity sport benefits such as health insurance,
 11 financial scholarships, and preferential class scheduling. (*Id.* ¶ 25(b).)

12 The Regents of the University of California are charged with overseeing the administration and
 13 operation of UCD, including its athletic program. (Compl. ¶¶ 12 & 18.) The individual Defendants,
 14 Larry Vanderhoef and Greg Warzecka, are responsible for the day-to-day administration of UCD and its
 15 athletic program. (*Id.* ¶¶ 15-17.) They are also the individuals responsible for managing and ensuring
 16 non-discrimination in the athletic program. (*Id.*)

17 The complaint was filed on July 24, 2007 and asserts four claims for relief: (1) violation of Title
 18 IX for failure to provide equal athletic opportunities to women; (2) violation of 42 U.S.C. section 1983
 19 based on the equal protection clause of the U.S. Constitution; (3) violation of the California Unruh Civil
 20 Rights Act; and (4) violation of public policy based upon the California Constitution and the California
 21 Education Code. (Docket # 1.) Defendants filed their Rule 12(b)(6) motion on October 26, 2007.
 22 (Docket # 20-26.)

23 A related case, *Mansourian v. Board of Regents of the Univ. of Cal.* (E.D. Cal., No. 2:03-CV-
 24 02591-FCD-EFB), was filed on December 18, 2003. The *Mansourian* action alleges identical violations
 25 of the law as are alleged in this case, that UCD has failed to provide equal athletic opportunities to
 26 women in violation of Title IX. Initially, *Mansourian* was a putative class action, but after Plaintiffs
 27 were denied leave to amend the complaint, they voluntarily dismissed the class allegations of the
 28 complaint. Discovery in the *Mansourian* matter closes on December 28, 2007 and the case is scheduled

1 for trial on June 17, 2008.

2 **III. ARGUMENT**

3 **A. Standard for a Motion to Dismiss Is a High Standard, Particularly in Civil Rights
4 Cases, Which Defendants Cannot Overcome.**

5 A court “may dismiss a complaint only if it is clear that no relief could be granted under any set
6 of facts that could be proved consistent with the allegations.” *Swierkiewicz v. Sorema N.A.*, 534 U.S.
7 506, 514 (2002) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). The allegations of the
8 complaint must be accepted as true. *Cruz v. Beto*, 405 U.S. 319, 322 (1972). The court must give a
9 plaintiff the benefit of every reasonable inference to be drawn from the well-pleaded allegations of the
10 complaint. *Retail Clerks Int'l Ass'n v. Schermerhorn*, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff
11 need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly
12 alleged. *See id.*

13 The court may not dismiss a complaint in which the plaintiff has alleged “enough facts to state a
14 claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974
15 (2007). Only where a plaintiff has “nudged [the] claims across the line from conceivable to plausible,”
16 is the complaint properly dismissed. *Id.* The high standard on a motion to dismiss is applied with
17 “particular strictness” in civil rights cases. *Shechter v. Comptroller of City of New York*, 79 F.3d 265,
18 270 (2nd Cir. 1996).

19 In addition, the court may only consider the facts stated within the four corners of the complaint.
20 The court may not examine any external facts, unless they are facts that are subject to judicial notice
21 under Federal Rules of Evidence, rule 201. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir.
22 2001); *Isuzu Motors Ltd. v. Consumers Union of U.S., Inc.*, 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

23 **B. Plaintiffs Have Properly Pled that UCD Is Violating Title IX.**

24 **1. The Mandate of Title IX.**

25 Congress enacted Title IX in 1972 to prohibit gender discrimination by educational institutions
26 which receive federal financial assistance. Title IX reads in pertinent part:

27 No person in the United States shall, on the basis of sex, be excluded from participation in, be
28 denied the benefits of, or be subjected to discrimination under any education program or activity
receiving federal financial assistance, . . .

1 20 U.S.C. § 1681(a). As the extensive legislative history of Title IX makes clear, Congress intended
 2 Title IX to operate as a broad remedial measure that would combat well-documented sex discrimination
 3 in educational institutions, including athletic programs. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 683
 4 (1979). Congress continuously rejected attempts to exclude or limit Title IX's reach with respect to
 5 intercollegiate athletics, focusing on Title IX's critical role in addressing the pervasive problems of sex
 6 discrimination in intercollegiate athletics. *See, e.g., Discrimination Against Women: Hearings Before*
 7 *the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor on § 805 of H.R. 16098*, 91st
 8 Cong., 2d Sess. (1970); 118 Cong. Rec. 5804 (1972) (Title IX was intended to be “a strong and
 9 comprehensive measure … [that would] provide women with solid legal protection from the persistent,
 10 pernicious discrimination which is serving to perpetuate second-class citizenship for American
 11 women”).

12 The regulations promulgated pursuant to Title IX require educational institutions receiving
 13 federal funds to “**provide equal athletic opportunity for members of both sexes.**” 34 C.F.R. §
 14 106.41(c) (emphasis added). The regulations offer a non-exclusive list of ten factors which should be
 15 considered in assessing compliance. The Regulations require schools take such remedial actions as are
 16 necessary to overcome the effects of sex discrimination in violation of Title IX. 34 C.F.R. § 106.3(a).
 17 The Regulations further require that sponsors of intercollegiate athletics programs comply with the
 18 Regulations within three years of their effective date, which was July 21, 1975. 34 C.F.R. § 106.41(d).

19 The critical factor in this case is “[w]hether the selection of sports and levels of competition
 20 effectively accommodate the interests and abilities of members of both sexes.” 34 C.F.R. §
 21 106.41(c)(1). It is well-established that “an institution may violate Title IX simply by failing to
 22 accommodate effectively the interests and abilities of student athletes of both sexes.” *Roberts v.*
 23 *Colorado State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993) (citations omitted); *Cohen v. Brown*
 24 *Univ.*, 991 F.2d 888, 897-98 (1st Cir. 1993) (“*Cohen II*”); *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578,
 25 584-85 (W.D. Pa. 1993).

26 In 1979, the Office of Civil Rights (OCR) issued a Policy Interpretation to provide further
 27 guidance on the meaning of equal athletic opportunity. Title IX: A Policy Interpretation, 44 Fed. Reg.
 28 71,413, *et seq.* (1979) (the “Policy Interpretation”). The Policy Interpretation essentially separates Title

1 IX athletics claims into three categories: (1) ineffective accommodation (i.e., failure to provide enough
 2 participation opportunities); (2) athletic financial assistance; and (3) equal treatment and benefits for
 3 existing teams and athletes. This case is about ineffective accommodation – a demand for more
 4 women's sports teams to accommodate the long-existing yet long-unmet interests and abilities of UCD
 5 women students.

6 The Policy Interpretation sets forth a three-pronged test:

7 In effectively accommodating the interests and abilities of male and female athletes,
 8 institutions must provide both the opportunity for individuals of each sex to participate in
 9 intercollegiate competition, and for athletes of each sex to have competitive team
 schedules which equally reflect their abilities.

10 a. Compliance will be assessed in any one of the following ways:

11 (1) Whether intercollegiate level participation opportunities for male and female students
 12 are provided in numbers substantially proportionate to their respective enrollments; or

13 (2) Where the members of one sex have been and are under-represented among
 14 intercollegiate athletes, whether the institution can show a history and continuing practice
 of program expansion which is demonstrably responsive to the developing interest and
 abilities of the members of that sex; or

15 (3) Where the members of one sex are underrepresented among intercollegiate athletes,
 16 and the institution cannot show a continuing practice of program expansion such as that
 17 cited above, whether it can be demonstrated that the interests and abilities of the members
 of that sex have been fully and effectively accommodated by the present program.

18 44 Fed. Reg. at 71,418. Courts look at the three prong test as a whole. "Put another way, Part (1)
 19 provides that if institutions have not distributed athletic opportunities in numbers 'substantially
 20 proportionate' to the gender composition of their student bodies, they have presumptively violated Title
 21 IX. The rest of the test recognizes that there are circumstances under which, as a practical matter,
 22 something short of substantial proportionality will suffice to rebut the presumption that Title IX has
 23 been violated." *Neal v. Bd. of Trustees of Cal. State Univ.*, No. CV-F-97-5009-REC-SMS, 1997 WL
 24 1524813, *9 (E.D. Cal. Dec. 26, 1997).

25 **2. Plaintiffs Have Properly Pled that Defendants Ineffectively Accommodate
 26 the Interests and Abilities of Women Students.**

27 Defendants ask the Court to rule as a matter of law that (1) UCD's disparity between male and
 28 female participation in relation to their enrollment numbers is 6%; and (2) a 6% disparity is *close*

1 enough to substantial proportionality to find that Defendants are complying with Title IX. Defendants
 2 are incorrect on both counts.

3 First, the actual disparity between men and women athletes is inherently a matter of fact. There
 4 is no agreement between the parties as to what those numbers are. As Plaintiffs allege, the 6% disparity
 5 is based on UCD's own numbers. Plaintiffs specifically allege:

6 22. According to the most recent publicly available report that UC Davis has filed
 7 with the United States Department of Education pursuant to the Equity in Athletics Disclosure Act, 20 U.S.C. section 1092, during the 2005-2006 academic
 8 year, women comprised approximately 56% percent of the student population. However, women comprised only 50% percent of the participants on the
 9 intercollegiate varsity teams offered by UC Davis. Upon information and belief,
 10 the disparity between the rate of participation in intercollegiate athletics among
 women and women's enrollment is approximately the same today.

11 23. UC Davis has a practice of providing its male students with greater athletic
 12 opportunities which has continued over time. As alleged above, UC Davis does
 13 not offer female students opportunities to participate in intercollegiate athletics
 14 substantially proportionate to the percentage of women enrolled as students. On
 15 information and belief, UC Davis has established and maintained its men's
 16 intercollegiate athletic teams based upon different criteria than women's teams,
 17 relying to a greater extent, in the case of men, on recruiting athletes from various
 18 sources to determine which teams to establish and maintain.

19 24. UC Davis does not have a history or continuing practice of expanding
 20 intercollegiate athletic opportunities for women students to accommodate their
 21 existing or developing interests. For example, at various periods of time since the
 22 passage of Title IX, female participation opportunities for women have actually
 23 decreased even though the number of female students has steadily risen over the
 24 years. In addition, UC Davis has eliminated women's varsity teams, including
 25 field hockey and wrestling.

26 25. UC Davis has not fully and effectively satisfied the interest of women students in
 27 intercollegiate varsity athletic opportunities.

28 (Compl. ¶¶ 22-25.) Plaintiffs also allege that there are approximately 12,000 women athletes at
 UCD. (Compl. ¶ 21.)

29 As the case proceeds, Plaintiffs may discover that the disparity is in fact larger than 6% due to a
 30 variety of factors, including how UCD counts and reports its women athletes. Plaintiffs do not accept
 31 the 6% disparity as true; they allege it as evidence that even according to UCD's own numbers, it
 32 continues to deny women athletes a significant number of participation opportunities. Thus, there is no
 33 opportunity for the Court to decide as a matter of law that 6% could satisfy Prong 1.

34 Second, even if Defendants numbers were accurate, a 6% disparity in an athletic program as

1 large as UCD's is not "substantially proportionate." Even under UCD's numbers, more than 80 women
 2 are denied equal athletic opportunity – a number large enough to field at least three new varsity teams.
 3 As the Regulations, Policy Interpretation and case law make clear, substantial proportionality
 4 contemplates something at or very near actual proportionality. Indeed, the OCR's 1996 Clarification of
 5 the Policy Interpretation dictates that an institution's numbers are not substantially proportionate unless
 6 and until the disparity is less than the number of athletes required to field a new team. U.S. Dep't of
 7 Educ., Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-*
 8 *Part Test* (Jan. 16, 1996), available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html> ("OCR
 9 1996 Clarification"). Because UCD is far from actual proportionality, it cannot avail itself of Prong 1 at
 10 all and instead will have to defend this case by arguing that it is in compliance with Prongs 2 or 3.

11 Defendants offer no authority to support their contention that compliance with Title IX through
 12 Prong 1 can be met with something *less than* actual proportionality. All law is, in fact, to the contrary.
 13 The regulations explicitly and unequivocally require schools to provide "*equal* athletic opportunity." 34
 14 C.F.R. § 106.41(c) (emphasis added). The OCR, the agency charged with administering Title IX, has
 15 repeatedly emphasized that it contemplates something at or very near actual proportionality to satisfy
 16 Prong 1. The OCR has instructed its Title IX compliance investigators that actual proportionality is the
 17 goal. The *Investigator's Manual* states: "if the enrollment is 52% male and 48% female, then, ideally,
 18 about 52% of the participants in the athletics program should be male and 48% female . . ." Valerie M.
 19 Bonnette & Lamar Daniel, *Title IX Athletics Investigator's Manual 1990* (U.S. Dept. of Educ., Office
 20 for Civil Rights, Apr. 2 1990), at 24. The manual also states "[t]here is no set ratio that constitutes
 21 'substantially proportionate'." *Id.*

22 The OCR's 1996 Clarification explains that actual proportionality is expected except in rare
 23 circumstances to account for such occurrences as "natural fluctuations in enrollment and participation
 24 rates or because it would be unreasonable to expect an institution to add athletic opportunities in light of
 25 the small number of students that would have to be accommodated to achieve exact proportionality."
 26 The acceptable exceptions to actual proportionality noted by the OCR as examples include a 2%
 27 deficiency as a result of a 2% increase in women's enrollment the year following exact proportionality,
 28 and a 5% and 6 athlete deficiency in a program of only 60 athletes, where adding 6 athletes would *not* be

1 enough to field a team. OCR 1996 Clarification.

2 Tellingly, the example given by the OCR of a university that is not in compliance with Prong 1 is
 3 an even less egregious situation than that alleged by Plaintiffs:

4 For instance, Institution A is a university with a total of 600 athletes. While women make up 52
 5 percent of the university's enrollment, they only represent 47 percent of its athletes. If the
 6 university provided women with 52 percent of athletic opportunities, approximately 62
 7 additional women would be able to participate. Because this is a significant number of
 unaccommodated women, it is likely that a viable sport could be added. If so, Institution A has
 not met part one.

8 OCR 1996 Clarification. Here, Plaintiffs allege that approximately 12,000 women make up 56% of
 9 UCD's enrollment, but represent only 50% of its athletes. If UCD provided women with 56% of athletic
 10 opportunities, approximately 80 additional women would be able to participate. (See Compl. ¶¶ 21-22.)
 11 Defendants' argument that a 6% deficiency under these facts in 2007 is *close enough* for Title IX
 12 compliance is unsupportable.

13 Not surprisingly, no court has ever held that *any* disparity between female enrollment and
 14 athletic participation satisfies the substantial proportionality requirement of Prong 1. All published
 15 cases hold that a lack of proportionality means that an institution may not use Prong 1 to establish Title
 16 IX compliance. *See, e.g., Roberts*, 998 F.2d at 829-30; *Weiker v. Mesa County Valley School Dist. #51*,
 17 No. CIVA05CV806-WYD-CBS, 2007 WL 595629, at *5 (D. Colo. Feb 21, 2007); *Cohen v. Brown*
 18 *Univ.*, 809 F. Supp. 978, 991 (D.R.I. 1992) ("*Cohen I*"); *Favia*, 812 F. Supp. at 585.

19 Defendants' attempt to distinguish these cases on the basis that the disparities are greater than
 20 that alleged here is entirely unconvincing. (Def's MPA at 6:19-20.) The courts in the *Roberts* and
 21 *Weiker* cases, for example, found that "substantial proportionality entails a fairly close relationship
 22 between athletic participation and undergraduate enrollment." *Roberts*, 998 F.2d at 830 (footnote
 23 omitted); *see also Weiker*, 2007 WL 595629, at *5.¹ This makes perfect sense. Prong I is *not*, as
 24 Defendants insist, a way for universities to avoid reaching actual proportionality more than three
 25

26 ¹ Defendants' attempted reliance on a settlement is even more far afield. Aside from being
 27 improperly before the Court (see Pltfs' Opp. to Defs' RJN, filed concurrently herewith) the settlement
 28 terms mandated that the defendant school increase its proportionality of women athletes to women
 enrolled to within 5%. The settlement is not, obviously, a judicial determination that 5% is the magic
 number to achieve "substantial proportionality." Moreover, the 5% is still *greater* proportionality than
 that alleged here.

1 decades after Congress called upon them to cease their widespread discrimination against women. As
 2 courts have noted, Prong 1 merely allows a rebuttable presumption of a Title IX violation to be created.
 3 Indeed, as one court stated, “the Policy Interpretation never states that a school is automatically in
 4 *compliance* with Title IX just because it has achieved a statistical balance.” *Neal*, 1997 WL 1524813, at
 5 *13 (emphasis in original). It is plain, at a minimum, that an institution cannot claim automatic
 6 compliance with Title IX when it has a statistical *imbalance*.

7 Prong 1 was never intended as a sword to argue that something less than actual equivalency is, as
 8 a matter of law, compliance with Title IX. To the contrary, because the ratio of women to men athletes
 9 is *not* substantially proportionate to the ratio of women to men students, Defendants cannot seek safety
 10 in Prong 1 and must instead – to avoid liability under Title IX – demonstrate that UCD has either a
 11 history of continued practice of program expansion that is demonstrably responsive to the interests and
 12 abilities of women athletes or that the interests and abilities of the members of that sex have been fully
 13 and effectively accommodated by its athletic program. Policy Interpretation, 44 Fed. Reg. at 71,418. As
 14 Plaintiffs will prove, Defendants can show neither.

15 In any event, these are clearly not issues to be resolved at the pleadings stage. Even if “equal
 16 opportunity” could be legally construed as something *less* than actual proportionality, this necessarily
 17 requires a factually intensive inquiry. As Plaintiffs allege, the 6% disparity is based on UCD’s own
 18 numbers – Plaintiffs may well be able to offer evidence that the disparity is in fact greater and will have
 19 to put the disparity in the context of the overall enrollment numbers and athletic program numbers and
 20 history of those numbers. As the OCR examples above make plain, there are facts regarding the size of
 21 UCD’s enrolled population and the size of its athletic program that must be established, as the disparity
 22 as measured by the percentage relative to the student body alone is not, in and of itself, necessarily
 23 dispositive. *See* OCR 1996 Clarification. It is therefore evident that a factual record must be developed
 24 before Plaintiffs know exactly what the current disparity is at UCD. *See, e.g., Pederson v. Louisiana*
 25 *State Univ.*, 213 F.3d 858, 878-79 (5th Cir. 2000) (finding a lack of substantial proportionality after
 26 consideration of a full factual record); *Weiker*, 2007 WL 595629 at *5 (determining after thorough
 27 consideration of all facts presented on summary judgment, that the disparity of 6.1% to 10.4% over a
 28 three year period demonstrated the defendant high school’s failure to comply with Prong I of Title IX.)

1 Finally, Defendants' claim that UCD has provided more opportunities for women athletes than
 2 for male athletes is of no weight. Extending this logic would lead to ridiculous results. Defendants
 3 would have this Court find, as a matter of law, that they would be complying with Title IX if they
 4 provided 1000 athletic opportunities to women and 900 to men, even if the population at the school was
 5 3000 women and 900 men. This is clearly not the result intended by Title IX.

6 Defendants' claim that UCD complies with Title IX as a matter of law where it is providing at
 7 least 80 fewer athletic participation opportunities for women than for men relative to their respective
 8 enrollment must be rejected.

9 **3. Plaintiffs "Claim" for Unequal Financial Aid Cannot Fail Because Such a
 10 Claim is Not Plead.**

11 Plaintiffs' complaint includes allegations of fact regarding Defendants' failure to distribute
 12 financial assistance equally. Plaintiffs plead that UCD continues to violate Title IX by offering unequal
 13 financial resources because female students are provided with less financial assistance than to male
 14 students in proportion to their enrollment. (*See, e.g.*, Compl. ¶¶ 53, 54.) However, Plaintiffs do not
 15 allege these facts as a distinct claim, nor as an element of a claim. Plaintiffs allege the unequal financial
 16 aid distribution as a fact relevant to Defendants' discriminatory behavior in violation of Title IX.
 17 Plaintiffs are entitled to plead facts relevant to and supportive of their legal claims. Defendants' attempt
 18 to "dismiss" allegations that do not constitute a claim is improper.

19 **C. Plaintiffs Have Properly Pled a Claim for Violation of the Equal Protection Clause
 20 of the U.S. Constitution.**

21 Plaintiffs assert a claim against Defendants under 42 U.S.C. § 1983 for violation of the Equal
 22 Protection Clause of the U.S. Constitution. Defendants assert that this claim is subsumed by Title IX.
 23 The Ninth Circuit has not ruled on whether an equal protection claim is subsumed by Title IX, and there
 24 is a split among the other circuits. Recent Supreme Court and Ninth Circuit authority signals, however,
 25 that equal protection claims are not subsumed by Title IX and that a claim for violation of constitutional
 26 rights under 42 U.S.C. § 1983 should be foreclosed only in the rarest of cases.

27 The Supreme Court has found a statutory scheme to bar enforcement of rights under § 1983 only
 28 three times. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120-21 (2005); *Smith v.*

1 *Robinson*, 468 U.S. 992, 1009-12 (1984); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers*
 2 Ass'n, 453 U.S. 1, 20-21 (1981). In *Sea Clammers*, the Court found that the “unusually elaborate
 3 enforcement provisions” of two federal environmental laws that “created so many specific statutory
 4 remedies” suggested that Congress did not intend to preserve a § 1983 right of action based on the
 5 federal statute (as opposed to any constitutional right). 453 U.S. at 13, 20-21. In *Smith v. Robinson*, the
 6 Supreme Court considered whether plaintiffs could assert claims under the Education of the
 7 Handicapped Act (“EHA”) as well as constitutional claims under section 1983. 468 U.S. at 1005.
 8 Importantly, the Court noted that although plaintiffs’ § 1983 claim was premised on the Constitution, the
 9 Constitution does not recognize a fundamental right to a “free and appropriate” public education and
 10 therefore provided no greater rights to plaintiffs than the EHA. Because the Court thus found that
 11 plaintiffs’ constitutional claim was “virtually identical” to the EHA claim, it framed the issue as whether
 12 “Congress intended that the EHA to be the exclusive avenue through which a plaintiff may assert those
 13 claims.” *Id.* at 1009. After engaging in a thorough analysis of the EHA’s provisions and legislative
 14 history, it then found that plaintiffs’ § 1983 claim was foreclosed because the “carefully tailored
 15 administrative and judicial mechanism” set out in the EHA demonstrated Congressional intent for the
 16 EHA to serve as the exclusive method by which plaintiffs could assert the right to a free appropriate
 17 public education.² *Id.* at 1009, 1013.

18 In *Rancho Palos Verdes*, the Supreme Court barred found the plaintiff could not rely on § 1983
 19 to enforce the Telecommunications Act of 1996 (“TCA”). The plaintiff brought a claim under the TCA
 20 itself for injunctive relief. Because the TCA does not provide for monetary relief, however, the plaintiff
 21 also sued under § 1983 based solely on the TCA as a way to seek damages. The Court found that the
 22 “detailed” scheme and “limited remedies” of the statute indicated an intent by Congress that the TCA be
 23 the exclusive remedy such that it is incompatible with parallel enforcement under § 1983. 544 U.S. at
 24 120-24; *see ASW v. Oregon*, 424 F.3d 970, 977-78 (9th Cir. 2005) (noting that the “dispositive issue” in
 25 *Rancho Palos Verdes* is “whether the private remedy provided by statute is more restrictive than those

27
 28 ² Congress promptly responded to the ruling by amending the statute to more expressly state that it
 did not intend the EHA to displace any other remedies. 20 U.S.C. § 1415(f); *see* H.R. Rep. No. 99-296,
 at 4 (1985).

1 available through a § 1983 action, such that the § 1983 action would function as an end run around the
 2 enforcement mechanism Congress provided” (citations omitted)). Observing that the TCA limited relief
 3 in ways that § 1983 did not, the Court concluded that enforcement of the TCA “through § 1983 would
 4 distort the scheme of expedited judicial review and limited remedies created by [the TCA].” *Id.* at 978
 5 (citations and internal quotes omitted).

6 The Ninth Circuit has reviewed this jurisprudence in depth and has determined that where, as
 7 here, “Plaintiffs have asserted a federal right presumptively enforceable under § 1983, the burden falls
 8 on [defendants] to rebut this presumption by showing that Congress has ‘specifically foreclosed a
 9 remedy under § 1983’ either expressly ‘or impliedly, by creating a comprehensive enforcement scheme
 10 that is incompatible with individual enforcement under § 1983.’” ASW, 424 F.3d at 977 (citation
 11 omitted); *see Rancho Palos Verdes*, 544 U.S. at 121-22. Moreover, a court must “begin [its] analysis by
 12 recognizing that we do ‘not lightly conclude that Congress intended to preclude reliance on § 1983 as a
 13 remedy for the deprivation of a federally secured right.’” ASW, 424 F.3d at 977 (citing *Price v. City of*
 14 *Stockton*, 390 F.3d 1105, 1114 (9th Cir. 2004) (quoting *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 520
 15 (1990))).³ Because the burden of Defendants is thus significant, the Ninth Circuit has held § 1983
 16 claims viable even where they are based on a federal statute and not the Constitution. *See, e.g.*, ASW,
 17 424 F.3d at 977; *Watson v. Weeks*, 436 F.3d 1152, 1161 (9th Cir.), *cert. denied sub nom.*, *Goldberg v.*
 18 *Watson*, 127 S. Ct. 598 (2006).

19 Against this backdrop, it is plain that Plaintiffs’ § 1983 claim survives. The circuit courts that
 20 have held equal protection claims to stand separate and apart from Title IX claims are in line with
 21 Supreme Court jurisprudence (and Ninth Circuit authority), while those that have found such claims to
 22 be foreclosed are contrary to the Court’s teachings. *See Communities for Equity v. Mich. High School*
 23 *Athletic Ass’n*, 459 F.3d 676, 684-85 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 1912 (2007) (“CFE II”);
 24 *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997) (finding no foreclosure of claim where § 1983
 25

26 ³ As the United States Supreme Court has explained, when two federal rights can coexist, the later
 27 one enacted is not to be deemed to repeal the earlier one unless there is clear congressional intent to do
 28 so, even though the result may be to give a plaintiff a choice of federal remedies. *See Branch v. Smith*,
 538 U.S. 254, 273 (2003); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 141-44
 (2001).

1 claim based on equal protection clause); *Seamons v. Snow*, 84 F.3d 1226, 1233-34 (10th Cir. 1996)
 2 (plaintiff has independent rights under Title IX and under § 1983 for violations of constitutional rights);
 3 *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 722-23 (6th Cir. 1996) (plaintiff's § 1983 action did
 4 not purport to gain remedies unavailable under Title IX, but instead sought to enforce distinct and
 5 independent substantive due process rights).⁴

6 The thorough analysis and reasoning of the Sixth Circuit in *CFE II* is particularly persuasive.
 7 The Court explained that even though the federal statutes "that created the very rights that they were
 8 asserting did not authorize monetary damages, the plaintiffs in *Sea Clammers* and *Rancho Palos Verdes*
 9 sought such damages pursuant to § 1983. This litigation strategy was explicitly disapproved of by the
 10 Supreme Court in both cases and forms the bedrock for the *Sea Clammers* principle." 459 F.3d at 684.
 11 The Court contrasted that with plaintiffs' § 1983 claim, which was not being used "as a vehicle to
 12 enforce the substantive federal law found in Title IX, but as a vehicle to recover for alleged violations of
 13 the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 684. The Court found this to be a
 14 "critical distinction" from the reasoning of *Sea Clammers* and *Rancho Palos Verdes*, which "hinges on
 15 the fact that when Congress created the particular rights through statute, it also created particular
 16 remedies for those statutory violations." *Id.* (citation omitted). A claim based on the Equal Protection
 17 Clause, to the contrary, would be actionable even if Congress had never enacted Title IX. Thus, to find
 18 preclusion, a court must find that "Congress intended to *abandon* the rights and remedies set forth in
 19 Fourteenth Amendment equal protection jurisprudence when it enacted Title IX in 1972." *Id.* (emphasis
 20 added).

21

22⁴ Indeed, the procedural history of the *CFE II* case is instructive. In an earlier opinion issued in
 23 the case, the Court of Appeals for the Sixth Circuit held that the Michigan High School Athletic
 24 Association ("MHSAA") had violated the Equal Protection Clause by discriminating against women
 25 high school athletes. *Communities for Equity v. Mich. High School Athletic Ass'n, Inc.*, 377 F.3d 504
 26 (6th Cir. 2004) ("CFE I"), vacated, 544 U.S. 1012 (2005). MHSAA filed a petition for certiorari to the
 27 U.S. Supreme Court, arguing that the plaintiffs' equal protection claim was foreclosed by Title IX. The
 28 U.S. Supreme Court granted the petition, and transferred the case back to the Sixth Circuit for
 reconsideration in light of the *Rancho Palos Verdes* case. The Sixth Circuit thoroughly considered the
 issue and concluded that plaintiffs could maintain their equal protection claim. *CFE II*, 459 F.3d at 684-
 85, 690. MHSAA petitioned the Supreme Court again, but the petition was denied. *Communities for
 Equity v. Mich. High School Athletic Ass'n*, 127 S. Ct. 1912 (2007).

1 Applying the Supreme Court's test in *Smith*, which did involve a constitutional claim, the Sixth
 2 Circuit then found that Title IX would preclude an equal protection claim only if: (1) the Title IX claim
 3 is "virtually identical" to the constitutional claim, *and* (2) the remedies provided in Title IX indicate that
 4 Congress intended to preclude reliance on § 1983. *CFE II*, 459 F.3d at 685; *Smith*, 468 U.S. at 1009.
 5 Noting that only one part of the test need be answered in the negative, the Court found that Congress did
 6 not intend to preclude reliance on § 1983, finding that: (1) the only enforcement mechanism expressly
 7 authorized in Title IX is the withdrawal of federal funds, which stands in "stark contrast" to the
 8 comprehensive and "carefully tailored" administrative and judicial remedies at issue in *Sea Clammers*
 9 and *Smith*; (2) Title IX lacks any specific statutory remedies (again as contrasted with *Sea Clammers*
 10 and *Smith*) that could serve as evidence of Congress's intent for the statute to provide the exclusive
 11 means of relief; and (3) Title IX contains no express private remedy at all, noting that the Supreme
 12 Court in *Rancho Palos Verdes* explained that the existence of a private judicial remedy is an important
 13 factor to consider when attempting to discern congressional intent. *Id.* at 686. The Court found that the
 14 fact that the Supreme Court implied a private remedy for Title IX "gives strength to the argument that
 15 Congress did not intend for the termination of federal funds-the only remedy explicitly authorized by
 16 Title IX-to serve as a comprehensive or exclusive remedy. Rather, the Supreme Court held that an
 17 implied private right of action-in addition to the explicit remedy of termination of federal funds-was
 18 necessary to achieve the fundamental purpose of Title IX." *Id.* at 690 (citations omitted). The *CFE II*
 19 Court thus concluded that the remedies afforded in Title IX are insufficient to preclude the pursuit of a
 20 remedy under § 1983. *Id.*⁵

21 The analysis in *CFE II* applies with equal force here and should be followed. It is undisputed
 22 that Congress did not expressly foreclose a remedy for violation of equal protection when it passed Title
 23 IX. Moreover, even though Defendants utterly fail to meet their burden of demonstrating that Congress
 24 implicitly foreclosed Plaintiffs' constitutional equal protection claim, there are several strong indicators
 25 that no such foreclosure was intended.

26 First, in addition to those identified by the Court in *CFE II*, it is also notable that when Title IX
 27

28 ⁵ Much of the reasoning in *CFE II* was first announced in *Lillard*, which *CFE II* concluded remained good law after the issuance of *Rancho Palos Verdes*.

1 was passed in 1972, there was little protection against gender discrimination under the Equal Protection
 2 Clause because at that time only race and ethnicity received heightened scrutiny. It was not until the
 3 Supreme Court's decision in 1976 in *Craig v. Boren*, 429 U.S. 190, 204-05 (1976) that the Court
 4 recognized "sex" as a suspect class entitled to heightened scrutiny. Thus, when enacting Title IX in
 5 1972, Congress could not possibly have considered that it was foreclosing a constitutional right that had
 6 been recognized by the Supreme Court.

7 Second, Plaintiffs' equal protection claim is not identical to their Title IX claim for many
 8 reasons, including: (1) Title IX covers only entities receiving federal funds, while § 1983 covers all state
 9 actors whether or not they receive federal funds; (2) conditions that violate the Constitution may not
 10 necessarily violate Title IX. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732-33
 11 (1982) (striking down female-only nursing school policy under Equal Protection Clause and noting that
 12 Title IX explicitly allows single-sex admissions policies in certain instances); (3) Section 1983 allows
 13 recovery against individuals, *see Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982), while most courts
 14 have held that Title IX does not. *See, e.g., Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 901 (1st Cir.
 15 1988) (indicating that damages under Title IX may be available only from educational institutions, not
 16 individuals).

17 Third, the Supreme Court has held that an implied right of action exists to enforce Title IX
 18 specifically because the statute lacks comprehensive administrative enforcement mechanisms. *Cannon*,
 19 441 U.S. 677. While Title IX regulations allow individuals to file complaints with the OCR, 34 C.F.R. §
 20 106.71, the process does not, for example, require OCR to address claims, allow complainants to present
 21 evidence or witnesses, or require remedies tailored to complainants. *See id.* at 706 n.41; *Franklin v.*
 22 *Gwinnett County Pub. Schs.*, 503 U.S. 60, 76 (1992) (finding private right of action for money damages
 23 under Title IX because administrative process would leave complainant "remediless"). Moreover, the
 24 Supreme Court has consistently held that an administrative process designed to lead to the withdrawal of
 25 federal funds is not the kind of comprehensive enforcement scheme required to subsume § 1983
 26 remedies. *See Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 521 (1990); *Wright v. City of Roanoke Redev. &*
 27 *Hous. Auth.*, 479 U.S. 418, 428 (1979). In addition, because Title IX's cause of action is judicially
 28 implied, its remedial scheme may be limited by the judiciary. *See Gebser v. Lago Vista Indep. Sch.*

1 *Dist.*, 524 U.S. 274, 284 (1998). Thus, Title IX's remedial framework is not sufficiently comprehensive
 2 to warrant § 1983 preclusion. Plaintiffs may thus properly proceed with their equal protection claim.

3 **D. The Individual Defendants Are Not Entitled to Qualified Immunity from Plaintiffs'
 4 § 1983 Claim for Violation of Their Constitutional Right to Equal Protection.**

5 Defendants' claim of qualified immunity fails because their refusal to provide equal athletic
 6 opportunities to women, as alleged in the complaint, violates the well-known and long-established
 7 constitutional right to equal protection. Defendants' contention that they are entitled to qualified
 8 immunity based on an analysis of rights under Title IX is fatally flawed. The right at issue under
 9 Plaintiffs' § 1983 claim is whether Defendants violated their constitutional equal protection rights by
 10 refusing to provide them with equivalent educational athletic opportunities on the basis of their gender.
 11 Plaintiffs' § 1983 claim is thus based on their constitutional right to equal protection, not on Title IX and
 12 the three-prong test.⁶ Because the right to equal protection is a well-established and fundamental right, a
 13 government official is not entitled to qualified immunity when their conduct violates that right. *Harlow*,
 14 457 U.S. at 819. Moreover, whether these Defendants reasonably believed their conduct to be lawful is
 15 a question of fact not suitable for resolution at the pleadings stage. The motion to dismiss on this ground
 16 should be denied accordingly.

17 The determination of whether qualified immunity protects Defendants from liability requires a
 18 two-step inquiry: first, is the law clearly established and second, could a reasonable official have
 19 believed the conduct was lawful under the law. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir.
 20 1993). Once Plaintiffs establish that the law was clearly established, the burden shifts to Defendants to
 21 prove that their conduct was reasonable. *LSO Ltd. v. Stroh*, 205 F.3d 1146, 1157 (9th Cir. 2000). In
 22 cases, such as this one, where the law is clearly established, "the immunity defense ordinarily should
 23 fail, since a reasonably competent public official should know the law governing his conduct." *Harlow*,
 24 457 U.S. at 818-19. The court's inquiry may end after a finding that the law is well-established because
 25 an official's violation of established law is inherently unreasonable. *C.N. v. Wolf*, 410 F. Supp. 2d 894,

26
 27 ⁶ If this Court accepts Defendants' position that the rights at issue are based on a violation of Title
 28 IX, Plaintiffs strongly contend that the law is also well-established. Title IX has existed for over 30
 years and numerous well-reasoned cases, including *Cohen II*, 991 F.2d 888, have consistently applied it
 to college athletic departments.

1 899 (C.D. Cal. 2005) (ending inquiry after determining that equal protection claim was established law).

2 Here, the Court's inquiry similarly should end upon resolution of the first step. Plaintiffs allege a
 3 violation of a well-established constitutional right to equal protection under the law. It is well settled
 4 that an institution's refusal to provide equal opportunities to women in athletics violates the equal
 5 protection clause. *See, e.g., Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1130 (9th Cir. 1982)
 6 (inequality in athletics program is a violation of equal protection). Similarly, the constitutional
 7 guarantee of equal protection prohibits discrimination on the basis of gender is now firmly settled. *See*
 8 *United States v. Va.*, 518 U.S. 515, 539-40 (1996) (exclusion of women from military college is
 9 violation of equal protection); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 128 (1994) (gender
 10 discrimination in jury selection is violation of equal protection); *Craig*, 429 U.S. at 204-05 (gender
 11 discrimination in statute is violation of equal protection). Constitutional rights to equal protection are
 12 clearly established rights; thus, "there is no basis for assessing the objective reasonableness of the
 13 conduct." *C.N.*, 410 F. Supp. 2d at 899.

14 The second level of inquiry is unnecessary where, as here, a reasonable official could not have
 15 been unaware of Plaintiffs' constitutional right to equal protection. Indeed, courts have refused to
 16 extend qualified immunity where the law at issue was arguably less established than in this case. For
 17 example, in *LSO Ltd.*, 205 F.3d 1146, city officials sought to prevent a private organization from
 18 holding an erotic art show on city property. *Id.* at 1150. In the complex legal area of free speech and
 19 obscenity, the Ninth Circuit overturned a district court's finding that the free speech right was not
 20 clearly established rejecting the court's conclusion that the law was ambiguous. *Id.* at 1157. The *LSO*
 21 Court held that the city officials should have understood the previous year's Supreme Court's decision
 22 regarding liquor licenses and obscenity laws. *Id.* at 1159. In contrast, here, the right of women athletes
 23 to be given equal opportunity to participate and receive financial aid requires no complicated analysis of
 24 Supreme Court jurisprudence, nor have there been any recent upheavals in the law.

25 Even if this Court proceeds to the second prong of the analysis, Defendants cannot meet their
 26 burden at the pleadings stage to establish that their alleged conduct was reasonable. Defendants' burden
 27 of proving reasonableness is high because where the right is a clearly established right, qualified
 28 immunity is not appropriate, "no matter how unclear [it is] that the particular action is a violation."

1 *Todd v. U.S.*, 849 F.2d 365, 370 (9th Cir. 1988). Moreover, the inquiry into the appropriateness of
 2 qualified immunity is an objective “fact-specific” test. *Thorsted v. Kelly*, 858 F.2d 571, 573 (9th Cir.
 3 1988). Often the inquiry is a question of fact, not a matter of law which can be resolved solely on the
 4 pleadings. *Id.* at 575. Significantly, where a showing of reasonableness requires an inquiry into an
 5 official’s knowledge or raises a question regarding the facts underlying the claim, the immunity question
 6 cannot be resolved at the pleading stage. *Id.*

7 Here, in order to show reasonableness, Defendants must rely on facts beyond the four-corners of
 8 the complaint, such as their subjective knowledge and belief regarding the right to equal protection.
 9 Since Defendants must prove that they reasonably believed that the refusal to provide equal athletic
 10 opportunities to women complied with Plaintiffs’ established constitutional right to equal protection,
 11 whether they are entitled to qualified immunity requires resolution of facts not proper at the pleadings
 12 stage. Defendants’ motion must fail accordingly.

13 **E. The Individual Defendants Are Not Entitled to Discretionary Immunity.**

14 Defendants argue that the actions of the individual Defendants in this case involved “a
 15 discretionary, as opposed to a ministerial” decision, and that they are, therefore, immune from liability
 16 under California Government Code section 820.2. (Def’s MPA at 20:22-24.) The California Supreme
 17 Court has long established, however, that the issue of whether discretionary immunity applies requires
 18 an analysis based upon the underlying purpose of immunity, rather than a mechanical or literal approach
 19 of determining whether discretion was involved. *Johnson v. State*, 69 Cal. 2d 782, 795 n.8 (1968). The
 20 California Supreme Court recognized that immunity only applies in a narrow category of cases, “the rule
 21 is liability, immunity is the exception.” *Lopez v. S. Cal. Rapid Transit Dist.*, 40 Cal. 3d 780, 792 (1985)
 22 (citation and internal quotes omitted).

23 The sole purpose of discretionary immunity is to prevent judicial inquiry into sensitive policy
 24 decisions of government employees that are best left to agencies other than the courts. *Johnson*, 69 Cal.
 25 2d at 795 n.8. Thus, immunity applies “only to deliberate and considered policy decisions, in which a
 26 conscious balancing of risks and advantages took place.” *Caldwell v. Montoya*, 10 Cal. 4th 972, 981
 27 (1995) (citation, internal quotes, alterations, and emphasis omitted). The decision must have been one
 28 made at the planning stage, as immunity does not exist for decisions implementing a policy already in

1 place. *Barner v. Leeds*, 24 Cal. 4th 676, 685 (2000). It is Defendants' burden to make a showing that a
 2 decision was undertaken at the planning level, which consciously and deliberately balanced risks and
 3 advantages. *Johnson*, 69 Cal. 2d at 795 n.8.

4 Additionally, even where a government employee's actions involve complex decisions which
 5 require the exercise of skill and judgment, they do not enjoy discretionary immunity unless the actions
 6 constitute basic policy decisions rather than the implementation of a basic policy already formulated.
 7 *Barner*, 24 Cal. 4th at 685. In *Barner*, the Supreme Court noted that the scope of the discretionary act
 8 immunity "should be no greater than is required to give legislative and executive policymakers sufficient
 9 breathing space in which to perform their vital policymaking functions." *Id.* (citations and internal
 10 quotes omitted). Thus, routine duties which are a part of the normal operations of the employee's office
 11 or position are not discretionary, while basic policy decisions made at the planning stage of operations
 12 qualify employees for immunity. *Taylor v. City of Los Angeles Dep't of Water & Power*, 144 Cal. App.
 13 4th 1216, 1238-39 (2006).

14 Defendants have not shown here that they are entitled to immunity as a matter of law for the acts
 15 alleged here.⁷ As support for their argument Defendants offer only the allegations in the complaint
 16 which reference the individual Defendants' knowledge that they were acting to implement UCD policy
 17 and their involvement in implementing such policy. (Def's MPA at 20-21.) The complaint does not
 18 allege that Defendants were responsible for creating or structuring UCD policy. The complaint merely
 19 alleges that Defendants acted within their respective roles to carry out UCD policy. Their involvement
 20 in the implementation of policy does not equate to planning or creating a policy. Defendants cannot
 21 point to an allegation that they planned the underlying policy decision. Nor is there any allegation that
 22 Defendants' engaged in discretionary decision making. In fact, the complaint does not address the
 23 creation of UCD's policy regarding Title IX, rather it alleges Defendants' operational acts to implement
 24 that policy. (Compl. ¶ 17.) Thus, Defendants' reliance on Plaintiffs' allegations that they knew and
 25 understood their decisions does not give rise to immunity. *See McQuirk v. Donnelley*, 189 F.3d 793,

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 27 ⁷ Defendants' contention that Plaintiffs' position on the issue of whether discretionary immunity
 28 applied here conflicts with the causation element of their liability claim mixes apples and oranges.
 Plaintiffs do not contend that the individual took no acts that subject them to liability, only that the acts
 alleged, by their nature, are not entitled to discretionary immunity.

1 799 (9th Cir. 1999); *Neary v. Regents of the Univ. of Cal.*, 185 Cal. App. 3d 1136, 1142 (1986).

2 Similarly, even where discretion, as that term is commonly used, is actually exercised, immunity
 3 under section 820.2 does not apply unless such discretion is exercised in the context of a basic policy
 4 decision. *Barner*, 24 Cal. 4th at 685. Defendants' actions were operational decisions, not part of the
 5 Regents' "basic policy decisions" made at the "planning" stage. They did not entail "quasi-legislative"
 6 determinations of any kind. Accordingly, holding the individual defendants accountable for their
 7 tortious actions would not involve the type of judicial oversight that the Legislature feared in enacting
 8 section 820.2.

9 Defendants' reliance on *Caldwell v. Montoya*, *supra*, is misplaced. The court extended
 10 immunity to the personnel decision at issue in that case as a matter of law because the application of
 11 immunity to such decisions was compelled by California Supreme Court precedent. In *Lipman v.*
 12 *Brisbane Elementary Sch. Dist.*, 55 Cal. 2d 224 (1961), the Court held that a personnel decision by a
 13 school board was entitled to immunity because of the "vital public interest in securing free and
 14 independent judgment of school trustees in dealing with personnel problems." *Id.* at 230.

15 No such precedent or public policy compels the application of immunity to the alleged
 16 discriminatory treatment of students, much less at the pleadings stage. Rather, courts have declined to
 17 extend immunity under such circumstances. In *C.N. v. Wolf*, 410 F. Supp. 2d at 902-03, a high school
 18 student brought suit against the school district and its officials under state and federal civil rights laws
 19 claiming discrimination based on her sexual orientation. *Id.* at 900. Although defendants claimed that
 20 they were entitled to discretionary immunity for their acts, the Court declined to extend immunity at the
 21 pleading stage where the alleged misconduct did not implicate the fundamental policy decision at issue
 22 in *Caldwell*. *Id.* at 903. Similarly, the Court should decline to extend immunity to Defendants' acts
 23 here, especially at the pleading stage.

24 For all of the foregoing reasons, the Court should not grant defendants immunity for the acts
 25 alleged here.

26 **F. Plaintiffs Have Properly Pled a Violation of California Public Policy.**

27 Defendants' piecemeal attack of Plaintiffs' Fourth Claim for Relief, which alleges that
 28 Defendants' discriminatory treatment violates several California state law statutes and the California

1 Constitution that prohibit sex discrimination in education in this state, is insufficient to defeat this cause
 2 of action. In order to bring a tort for violation of public policy, Plaintiffs' must plead allegations to
 3 satisfy the following requirements: First, the policy must be supported by either constitutional or
 4 statutory provisions. Second, the policy must be "public" in the sense that it "inures to the benefit of the
 5 public" rather than serving merely the interests of the individual. Third, the policy must have been
 6 articulated at the time of the discharge. Fourth, the policy must be "fundamental" and "substantial."

7 *Stevenson v. Super. Ct.*, 16 Cal. 4th 880, 890 (1997).

8 Plaintiffs' complaint provides two sources of public policy – California Constitution and
 9 Education Code – and both of these sources meets the prerequisites set forth above. As to each,
 10 Plaintiffs make the necessary allegations. (See Compl. 74, 78-79.) These statutes clearly establish the
 11 substantial public policy against gender discrimination.

12 Defendants' suggestion that the claim is exclusive to employment law is incorrect. Courts have
 13 consistently upheld tort claims based on California's public policy against discrimination. *See, e.g.*,
 14 *Stevenson*, 16 Cal. 4th at 895 (Fair Employment and Housing Act declares a fundamental public policy
 15 against age discrimination); *Rojo v. Kliger*, 52 Cal. 3d 65, 90 (1990) (California Constitution (Art. 1, §
 16 8) declares a fundamental public policy against sex discrimination). It is not the specific statute or
 17 regulation that forms the basis for the tort, but the underlying policy reflected in it. *Green v. Ralee
 18 Eng'g Co.*, 19 Cal. 4th 66, 79 (1998). Significantly, it is the relationship and duty upon which the tort is
 19 based which gives rise to the right to recover. *See Johns-Manville Sales Corp. v. United States*, 622 F.
 20 Supp 443, 449 (N.D. Cal. 1985) (where no California tort principles neatly fit the case, but the
 21 government acted against public policy, the court found a tort action alleged).

22 Defendants contention that this entire claim must be dismissed because the statutes relied on do
 23 not authorize a private right of action is misdirected and irrelevant. Plaintiffs do not bring any
 24 independent cause of action under a Constitutional or statutory provision requiring a private right of
 25 action; rather, they have plead a tort claim which includes a private right of action. Further, the
 26 California Education Code sections 220 *et seq.* and 262.4 explicitly states that sections 200, 201, and
 27 220 may be enforced through a civil action. Cal. Educ. Code § 262.4. The right to proceed against
 28 individual defendants for violations of these statutes is well-settled. *C.N.*, 410 F.Supp.2d at 904. These

1 statutory provisions alone defeat Defendants' challenge to this claim.⁸

2 Defendants' challenge to Plaintiffs' claim in its reliance on the Constitution and other provisions
 3 of the Education Code is equally unavailing where Plaintiffs assert a public policy tort claim. Even if a
 4 statute does not authorize expressly an independent private right of action, when a legislative provision
 5 embodying a public policy is enacted for the protection of a particular class of persons, as is the case
 6 here, its violation may give rise to civil liability to an injured plaintiff who is a member of the class.
 7 *Hudson v. Craft*, 33 Cal. 2d 654, 659 (1949). Because Plaintiffs' public policy claim tort claim does not
 8 depend upon a showing that the Constitutional and statutory provisions from which the public policy
 9 emanates also authorize a private right of action, Defendants' challenge to this cause of action fails.

10 Additionally, relying principally on *Reynolds v. Bement*, 36 Cal. 4th 1075 (2005), Defendants
 11 argue that, even where a private right of action is authorized, there still remains a question of whether
 12 the individual Defendants can be held liable for damages. Defendants' argument is flawed, however,
 13 because Plaintiffs' claim for violation of public policy is a tort claim, based upon the important public
 14 policy, against discrimination in education. Accordingly, the question is not whether there is a private
 15 right of action for violation of a specific statute, but whether the Defendants engaged in tortious conduct
 16 in violation of public policy.

17 Moreover, unlike the Defendants here, the individual defendants in *Reynolds* against whom the
 18 plaintiffs sought liability had not engaged in any actions themselves in violation of the statute in
 19 question. They were merely officers, directors and shareholders of the corporate employer. The Court
 20 acknowledged that "directors may be 'jointly liable with the corporation and may be joined as
 21 defendants if they personally directed or participated in the tortious conduct.'" *Reynolds*, 36 Cal. 4th at
 22 1089-90. Here, the individual defendants are not merely officers or agents of the Regents but are
 23 individuals who were directly involved in and participated in the conduct which constituted the violation
 24 of public policy. Similarly, *Thornburg v. Superior Court*, 138 Cal. App. 4th 43 (2006) does not support
 25 Defendants' position because that case sought to establish statutory liability, not tort liability.

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 27
 28 ⁸ If the Court is inclined to dismiss Plaintiffs' public policy tort claim on any grounds, Plaintiffs
 request leave to amend to allege violations of these Education Code provisions as independent statutory
 claims.

1 Defendants' thus provide no case law that supports the proposition that the individual Defendants cannot
2 be held liable for damages. Therefore, the individual Defendants are not immune from any liability,
3 including damages.

4 **IV. CONCLUSION**

5 For the forgoing reasons, the Court must deny Defendants' Motion to Dismiss.

6 DATED: November 30, 2007

Respectfully Submitted,

7 THE STURDEVANT LAW FIRM
8 A Professional Corporation

9 By: /s/ Monique Olivier
10 MONIQUE OLIVIER
11 Attorneys for Plaintiffs

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